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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Implement the Commission's Procurement Incentive Framework and to Examine the Integration of Greenhouse Gas Emissions Standards into Procurement Policies.

Rulemaking 06-04-009
(Filed April 13, 2006)

**ADMINISTRATIVE LAW JUDGES' RULING
REQUESTING COMMENTS AND LEGAL BRIEFS ON MARKET ADVISORY
COMMITTEE REPORT AND NOTICE OF EN BANC HEARING**

1. Summary

Today's ruling requests comments and legal briefs on certain issues raised by the June 30, 2007 Market Advisory Committee report entitled, "Recommendations for Designing a Greenhouse Gas Cap-and-Trade System for California."¹ It also provides notice of an en banc hearing to be held on August 21, 2007 on potential designs for a regulatory program to address greenhouse gas (GHG) emissions in the electricity sector, in particular, the Market Advisory Committee's "first-seller" approach to the point of regulation, as described in this ruling.

2. Background and General Instructions

In Decision (D.) 07-07-018, the California Public Utilities Commission (Public Utilities Commission) amended the April 13, 2006 Order Instituting

¹ The report can be found at: http://www.climatechange.ca.gov/documents/2007-06-29_MAC_FINAL_REPORT.PDF

Rulemaking (OIR) to provide consideration in Phase 2 of Rulemaking (R.) 06-04-009 of issues raised by the Market Advisory Committee report. The Public Utilities Commission and the California Energy Commission (Energy Commission) plan to develop joint recommendations to the California Air Resources Board (ARB) regarding GHG emissions policies for the electricity and natural gas sectors in California, as ARB implements Assembly Bill (AB) 32.

In this ruling, we request comments focused on the design of a regulatory structure for greenhouse gas reductions referred to in the Market Advisory Committee report as the “first-seller” approach.

The main purpose of these comments is in preparation for a joint en banc hearing to be held on August 21, 2007 on this design topic. Parties may comment on aspects of the Market Advisory Committee report in addition to the issues raised in the set of questions below. In the future, there will be additional opportunities for more focused comments on such issues as flexible compliance and allocation of GHG emission allowances.

3. Questions to be Addressed in Comments and Legal Briefs

Parties may file comments and legal briefs no later than August 6, 2007 and replies no later than August 15, 2007.

At this stage, the two Commissions have a need to move beyond high-level, generic policy discussions and to obtain a detailed picture of the legal, regulatory, market and operational issues associated with the first-seller form of AB 32 compliance. Commenters who support and/or endorse the first-seller approach for an electricity sector cap-and-trade system, as identified in the Market Advisory Committee report, should answer all of the questions below, to the extent possible. Vague or general policy arguments in support of the

first-seller approach without more detailed concept definition will be of little value to the two Commissions in furthering policy development.

A. Basic Definitions

It appears that the first-seller concept discussed in the Market Advisory Committee report can be defined in the following manner: (a) for in-state California generation, the first seller is the generator, in all cases; and (b) for imported power, the first seller is the entity that first delivers electricity at a point of delivery within California.²

Utilizing the above description, for purposes of this ruling, we use the terms “deliverer” and “first-seller” interchangeably.

² The Market Advisory Committee describes the first-seller approach at several points in its report:

- “A *first-seller* approach: This places the legal obligation for compliance on the first seller of power into California electricity markets.” (Market Advisory Committee report, at 42.)
- “Under the first-seller approach, the responsible entity or point of regulation is either the owner or operator of the California power plant, or the importing contractual party, depending whether the electricity involves in-state or out-of-state generation. The importing contractual party could be any wholesale power marketer (it need not be an LSE [load-serving entity]).” (*Id.*)
- “The first seller approach presumably would impose a compliance obligation on contractors bringing power into the state, as identified on E-tags or through some other reporting mechanism.” (*Id.*, at 43.)
- “Under the first-seller approach, these emissions [from in-state power plants] could be monitored accurately. ... A first-seller approach would take advantage of emission monitoring at every source to achieve a precise connection between regulated entities and the emissions for which they are responsible under the program.” (*Id.*)
- “[T]he first seller approach is consistent in regulating the entity that first sells power into California’s electricity system, no matter where the power originated.” (*Id.*, at 45.)

This description is also intended to cover any entities responsible for electricity intended to be scheduled into California, including retail providers, brokers, marketers, or the California Independent System Operator (CAISO).

There are two possible market designs that would utilize this description of deliverer/first-seller. The first is a market design in which the deliverer/first-seller is both the entity that reports its GHG emissions as well as the point of regulation (the entity required to comply with AB 32). In the second option, the deliverer/first seller would report its GHG emissions, but the retail provider would be the point of regulation. Except where specifically indicated below, all of the questions in this ruling refer to the first option, where the deliverer/first seller is both the point of regulation and the entity required to report its emissions.

1. Is the above description of this deliverer/first-seller approach accurate? Comment on whether you agree with this description, and if not, explain how the first-seller approach should be described differently and why.
2. For imports, who has ownership of electricity when it enters California? Is the “Purchasing/Selling Entity” (on the North American Electric Reliability Corporation (NERC) E-tag) listed at the first Point of Delivery in California the deliverer/first seller? If this is generally the case, are there any exceptions?
3. Are there any inter-Balancing Authority imports not accounted for by E-tags? If so, describe these instances and explain how these imports can be accounted for.
4. What agency could/would identify importing contractual parties? Is there already a state or federal official compilation of these market participants?
5. Could the deliverer/first-seller be identified by means other than the NERC E-tag? If so, please explain.

6. How would a deliverer/first-seller system deal with power marketers and brokers?
7. How would treatment of imports differ in a deliverer/first-seller system compared to a load-based approach?
8. To sum up your answers to the previous questions, provide a succinct but complete definition that identifies, for each way in which electricity could be delivered to the California grid, the entities that would be responsible for compliance with AB 32 regulations under a deliverer/first-seller approach.

B. General Policy Issues

9. Compare and contrast the environmental integrity of a deliverer/first-seller and a load-based approach. How would a deliverer/first-seller approach address leakage? How would a deliverer/first-seller approach address contract shuffling?³
10. Would the scale of possible emissions leakage or contract shuffling differ under the deliverer/first-seller approach compared to a load-based approach?
11. Is there any advantage to applying the deliverer/first-seller approach to reporting only, while having the retail providers be the point of regulation (as with load-based)? Why or why not?
12. Compare and contrast the deliverer/first-seller and load-based approaches in terms of their impacts on electricity prices, costs, and reliability for consumers.

³ In AB32, leakage is defined as “a reduction in emissions of greenhouse gases within the state that is offset by an increase in emissions of greenhouse gases outside the state.” In contrast, contract shuffling refers to an accounting reallocation of a fixed quantity of GHG emissions (for example, total emissions over one year) in which emission reductions reported by one party in a capped system are achieved through the attribution of emissions to an entity outside the capped system. In the case of contract shuffling, total emissions may not increase, but they also would not decrease, as required by AB32.

13. Would a deliverer/first-seller approach and a load-based approach have different impacts on wholesale power prices? Which would result in higher prices? Why? Is this good or bad?
14. What impact would a deliverer/first-seller approach have on long-term investment in low-GHG emitting generation technologies? Is this better or worse than under a load-based cap? Why?
15. How would a deliverer/first-seller approach interact with an upstream program design as articulated in Chapter 4 of the Market Advisory Committee report? Explain your answer in detail.
16. What impact would a deliverer/first-seller approach have on electricity service providers?

C. Interaction with Energy Markets

17. Compare and contrast the impact that a deliverer/first-seller and a load-based system would have on the existing wholesale energy markets, both at the California Independent System Operator (CAISO) and outside of it.
18. For those entities participating in the CAISO markets, what would be the likely differential impacts of a deliverer/first-seller versus a load-based system on the CAISO's implementation of the Market Redesign and Technology Update (MRTU) system, including day-ahead and real-time markets for energy, transmission, and reserves?
19. To what extent would either approach (deliverer/first-seller or load-based) be likely to alter the dispatch of existing generation units in the near-term? Why? If there is a difference between the approaches, how significant would it be?

D. Interaction with Existing Programs and Policies

20. How would a deliverer/first-seller approach interact with the Public Utilities Commission's Resource

Adequacy requirements and procurement/portfolio oversight? How would this approach affect efforts to maintain resource adequacy by the publicly-owned utilities (POUs)?

21. How would a deliverer/first-seller approach interact with the Public Utilities Commission's promotion of end-use efficiency? How would this approach affect energy efficiency programs for the POUs? Under which system (deliverer/first-seller or load-based) would the penetration of end-use efficiency likely be greater? Why?
22. How would a deliverer/first-seller approach interact with the State's Renewable Portfolio Standard requirements (both existing and proposed)?
23. How should renewable energy generators be treated under a deliverer/first-seller system?
24. Compare and contrast the impact of a deliverer/first-seller and a load-based approach on the voluntary renewables market.
25. Would one approach (deliverer/first-seller or load-based) have an advantage over the other in producing the greatest amount of emissions reductions through modifications (*e.g.*, retrofitting, efficiency improvements, etc.) to existing power plants? Why?

E. Reporting, Tracking, and Verification

26. What would be the data and administrative requirements of the deliverer/first-seller approach?
27. How would the deliverer/first-seller approach relate to the Public Utilities Commission/Energy Commission Staff reporting protocol proposal, *i.e.*, would the deliverer/first-seller approach require modifications to the Staff reporting proposal, or could it serve as an interim reporting protocol? If modifications are required, what exactly would they be?
28. If a deliverer/first-seller approach is adopted, what would be the pros and cons of requiring reporting both

from deliverers/first sellers and retail providers, in order to provide ARB with multiple control data sets for comparison?

29. Compare and contrast the ability of a deliverer/first-seller and a load-based system to create confidence for investors and confidence for environmental advocates about tracking and compliance.
30. Who/what governs access to the purchasing/selling entity data on the NERC E-tags? What would a state agency need to do to obtain access to E-tag data?
31. What role would the CAISO play, if any, in the implementation and administration of a deliverer/first-seller program? What role would other control area operators or balancing authorities play?

**F. GHG Emissions Allowance
Allocation Issues**

32. Would implementation of a deliverer/first-seller approach necessitate auctioning of GHG emissions allowances? Why or why not?
33. If you do not believe that an auction would be required under the deliverer/first-seller approach, explain how an emissions allocation system would work under a deliverer/first-seller approach. In doing so, answer the following:
 - a. To whom would allocations be given?
 - b. If you recommend allowances be given to deliverers/first sellers, on what basis would allocations be given during any particular compliance period?
 - c. How would the state of California know how many allowances were needed by importers?
 - d. How would marketers be treated?
 - e. How would electricity service providers be treated?
 - f. Would zero-carbon generators also receive allowances?

- g. What would be the likelihood of windfall profits under such a system?
 - h. How could such a system prevent windfall profits?
34. If you recommend allocation of allowances to retail providers, followed by an auction to deliverers/first sellers, how would such an auction be administered? What kinds of issues would such a system raise?

**G. Relationship to Other Sectors
Under AB 32 in California**

35. Would GHG emissions allowances created under a deliverer/first-seller compliance regime in the electricity sector be compatible for trading with other sectors in the California economy, assuming a multi-sector cap-and-trade system? How?

**H. Relationship to a Multi-State System
Such as the Western Regional
Climate Action Initiative**

36. Compare and contrast the ability of a deliverer/first-seller and a load-based approach to avoid double-counting of emissions between states.
37. How should exports from California be handled under a deliverer/first-seller approach? Would the proper treatment of exports depend on whether the receiving state has a cap-and-trade system? If so, how?
38. If some states in the region adopt a source-based system (or a load-based system which also regulates exports), how would the State of California verify the true source of imports in order to avoid double-regulation of power imported from other capped states?
39. How would a deliverer/first-seller approach function relative to an Oregon load-based system (as currently proposed by Oregon)?

I. Interaction with Potential Federal Regulation

40. How easily could a deliverer/first-seller approach scale or link to multi-state, national, or international programs?
41. Would one approach (deliverer/first-seller or load-based) be easier to transition into a potential federal GHG regulatory system? If one would be superior in this respect, explain why and what assumptions you are making about the likely federal framework.
42. What are the merits of the deliverer/first-seller proposal as a model for other governments' efforts, particularly at the national level?

J. Questions for Legal Briefing

In response to each question in this section, cite relevant case law and/or Federal Energy Regulatory Commission (FERC) rules or regulations, and provide analysis.

Federal Power Act

43. Would the Federal Power Act preempt adoption of the deliverer/first-seller approach? Why or why not? Does it make any difference that the federal government has not issued any regulations in this specific area?
44. For purposes of your legal analysis of the previous question, would your opinion differ if the deliverer/first-seller were the reporting entity only and not also the point of regulation? Why or why not?
45. Could the deliverer/first-seller approach be designed or implemented in a way that would avoid or lessen problems under the Federal Power Act? If so, how?
46. Compare Federal Power Act issues under a deliverer/first-seller approach and a load-based approach.
47. If you conclude that Federal Power Act preemption would be a problem, could FERC action (e.g., approval of a CAISO tariff rule) ameliorate this problem? If so, what specifically

could FERC do? Could FERC ameliorate any Federal Power Act concerns related to publicly-owned utilities?

Dormant Commerce Clause

48. Does the deliverer/first-seller approach raise problems under the dormant Commerce Clause?
49. Could the deliverer/first-seller approach be designed or implemented in a way that would avoid or lessen problems under the dormant Commerce Clause? If so, how?
50. Are issues under the dormant Commerce Clause more or less serious under a deliverer/first-seller approach compared with a load-based approach? Explain.
51. The Market Advisory Committee report suggests that the value of GHG emission allowances “can be used to fund innovative emission reduction technologies and to focus pollution-reduction efforts in low-income and minority communities” or “can be utilized to provide transition assistance for workers and industries subject to strong market pressures from competitors operating in jurisdictions that lack similar caps on greenhouse gas emissions” (Market Advisory Committee report, at iv - v) or “should be directed to investments in end-use efficiency improvements” (*Id.*, at 54). Would these uses raise problems under the dormant Commerce Clause? Would these problems be more or less serious under a deliverer/first-seller approach compared with a load-based approach?

Authority to Auction

52. Does ARB have the authority, under AB 32 or any other statute, to auction allowances to emit greenhouse gases? Explain.

Other Legal Issues

53. Are there any other legal issues that the Public Utilities Commission and the Energy Commission should consider

in deciding whether to investigate the deliverer/first-seller approach further? Explain.

4. Notice of En Banc Hearing

An en banc hearing will be held at 9:30 a.m., on August 21, 2007, at the Public Utilities Commission Auditorium, State Office Building, 505 Van Ness Avenue, San Francisco, California 94102. The primary focus of the en banc hearing will be the deliverer/first-seller concept. A quorum of Commissioners from both the Public Utilities Commission and the Energy Commission may attend the en banc hearing. An agenda will be distributed to the service list in R.06-04-009 and posted on the Public Utilities Commission and Energy Commission web sites prior to the hearing.

We expect that, after the en banc hearing, the Assigned Commissioner will modify the Phase 2 scoping memo to specify the manner in which the issues and alternatives addressed in the Market Advisory Committee report may be considered further in Phase 2.

5. Filing Requirements

All parties filing comments and legal briefs, or replies, shall file them at the Public Utilities Commission's Docket Office and shall serve them consistent with Rules 1.9 and 1.10 of the Public Utilities Commission Rules of Practice and Procedure and Resolution ALJ-188. The parties shall serve their comments and legal briefs, and replies, on the service list for R.06-04-009 posted at www.cpuc.ca.gov when the filings are due, and shall mail a hard copy of the filings to the assigned Commissioner and assigned Administrative Law Judges.

To support the ability of the Public Utilities Commission and the Energy Commission to develop joint recommendations to ARB, we ask that parties submit their comments and legal briefs, and replies, both in R.06-04-009 and to the Energy Commission's docket 07-OIIP-01.

Procedures for submitting the filings to the Energy Commission are included here for the parties' convenience. The Energy Commission encourages comments by e-mail attachments. In the subject line or first paragraph of the comments, include **Docket 07-OIIP-01**. When naming your attached file, please include your name or your organization's name. The attachment should be either in Microsoft Word format or provided as a Portable Document File (PDF). Send your comments to docket@energy.state.ca.us and to project manager Karen Griffin at kgriffin@energy.state.ca.us. In addition to electronic filing, **one paper** copy must also be sent to:

California Energy Commission
Docket Office, MS-4
Re: Docket No. 07-OIIP-01
1516 Ninth Street
Sacramento, CA 95814-5512

Therefore, **IT IS RULED** that:

1. An en banc hearing shall be held at 9:30 a.m., on August 21, 2007, at the Public Utilities Commission Auditorium, State Office Building, 505 Van Ness Avenue, San Francisco, California. A quorum of Public Utilities Commission and Energy Commission Commissioners may attend the hearing.
2. As directed in this ruling, parties may file comments and legal briefs no later than August 6, 2007. Parties may file replies no later than August 15, 2007.
3. Parties shall file their comments and legal briefs, and replies at the Public Utilities Commission's Docket Office and shall serve them consistent with Rules 1.9 and 1.10 and Resolution ALJ-188. The parties shall serve their filings on the service list for R.06-04-009 posted at www.cpuc.ca.gov when the filings are due, and shall mail a hard copy of the comments to the assigned Commissioner and the assigned Administrative Law Judges.

Dated July 19, 2007, at San Francisco, California.

/s/JANET A. ECONOME for
Charlotte F. TerKeurst
Administrative Law
Judge

/s/ JONATHAN LAKRITZ
Jonathan Lakritz
Administrative Law Judge

INFORMATION REGARDING SERVICE

I have provided notification of filing to the electronic mail addresses on the attached service list.

Upon confirmation of this document's acceptance for filing, I will cause a Notice of Availability to be served upon the service list to this proceeding by U.S. mail. The service list I will use to serve the Notice of Availability is current as of today's date.

Dated July 19, 2007, at San Francisco, California.

/s/ ANTONINA V. SWANSEN

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**Last Update on 19-JUL-2007 by: LIL
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